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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DANNY TICHNELL

and

JAMES ARTHUR CALHOUN,

Petitioners

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Whether the death sentences imposed in these cases pursuant to Article 27, §§412-414, Maryland Annotated Code (1957, 1982 Repl.Vol.) were imposed in accordance with the Eighth and Fourteenth Amendments to the Constitution of the United States?

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STATEMENT OF THE CASE

Respondent accepts the Statement of the Case set forth in the Petition at pages 14-21.

REASONS FOR DENYING THE PETITION

THE MARYLAND CAPITAL PUNISHMENT STATUTE CLEARLY COMPORTS WITH THE DICTATES OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND, AS A RESULT, REVIEW IS UNWARRANTED.

Petitioners contend that the Maryland capital punishment statute, Article 27, §413 of the Maryland Code (1957, 1982 Repl.Vol.) violates the Eighth and Fourteenth Amendments to the United States Constitution because it fails to afford a sentencer unbridled discretion to impose a sentence of life without regard to the outcome of the legislatively enacted mechanism of weighing aggravating against mitigating circumstances. Because the Constitution requires no such discretionary authority,

Petitioner's contention is wholly without merit and therefore the Petition for Writ of Certiorari should be denied.

As noted in Woodson v. North Carolina, 428 U.S. 280, 303 (1976), the basic requirement of Furman v. Georgia, 408 U.S. 238 (1972), was that arbitrary and wanton jury discretion be replaced with objective standards to "guide, regularize, and make rationally reviewable the process for imposing a sentence of death." In analyzing State statutes enacted subsequent to the opinion in Furman, the Florida scheme was approved in which a jury makes an advisory recommendation as to sentence by weighing aggravating against mitigating circumstances, following which a judge acts upon the recommendation by conducting his own aggravating versus mitigating circumstances examination. Proffitt v. Florida, 428 U.S. 242, 248-51 (1976). In fact, the Florida Supreme Court had earlier described its statute as creating a presumption of death:

> "When one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).[1]

The Maryland statute does no more than was permitted there.

The Court similarly approved the Texas scheme which required that death be imposed if two (or three, if relevant) questions are answered in the affirmative. The Texas procedure was not found to be mandatory because of the unlimited scope of evidence that could be introduced and considered regarding the second question, i.e., the potential for future dangerousness.

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[1] As recognized in Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3430 n.3, 77 L.Ed.2d 1134, 1151 n.3 (1983) (concurring opinion of Stevens, J.), evolving caselaw indicates that this "presumption" may be overcome. Nevertheless, at the time approved by the Court, the Florida statute was thought to be "mandatory" to that extent.

The focus of the Court in determining adherence to the United States Constitution was with the scope of evidence that can be considered in assuring that an individualized sentence is imposed. Because of a restriction on evidence precluding the imposition of an individualized sentence, the capital punishment schemes of North Carolina, Woodson v. North Carolina, supra, and Louisiana, Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) were invalidated. As noted in the Roberts plurality opinion, the Louisiana statute, for example, provided "no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender." Id. at 333-34.

Petitioners do not contend, as they cannot, that the Maryland capital punishment scheme is mandatory in the same sense as Woodson or Roberts. Nor can Petitioners contend that the Maryland capital punishment statute in any way limits their right to produce evidence in mitigation or precludes consideration of any mitigating circumstance.[2] Rather, Petitioners contend that, while the Constitution may require the guidance of discretion through aggravating and mitigating circumstances in imposing a sentence of death, the Constitution simultaneously proscribes restrictions on discretion at the same sentencing proceeding regarding the sentencer's ability to impose a sentence of life.

In support of this proposition, Petitioners have placed reliance upon Justice Stevens opinion respecting the denial of certiorari in Smith v. North Carolina, ___ U.S. ___, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982). In that opinion, Justice Stevens seems to have separated the consideration of aggravating and

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[2] By Chapter 521, Laws of 1979, §g(8) was added to the statute, permitting the sentencer to delineate:

> "Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case."

mitigating circumstances from the determination into whether "death is the appropriate punishment in a specific case." Id., 103 S.Ct. at 475, quoting Lockett v. Ohio, 438 U.S. 586, 601 (1978) (plurality opinion). However, a review of the opinion in Lockett fails to indicate any basis for distinguishing between the weighing of aggravating and mitigating circumstances and the inquiry into whether "death is the appropriate punishment in a specific case."

The above-referenced quotation from Lockett may be more readily understood in its context of discussing the earlier Woodson opinion:

> "The plurality concluded, in the course of invalidating North Carolina's mandatory death penalty statute, that the sentencing process must permit consideration of the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.' Woodson v. North Carolina, 428 U.S., at 304, 49 L.Ed.2d 944, 96 S.Ct. 2978, in order to insure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.' Id., at 305, 49 L.E.2d 944, 96 S.Ct. 2978. . . ." Lockett v. Ohio, 438 U.S. at 601.

Thus, as is readily apparent, that portion of the Lockett opinion did not contemplate a separate inquiry into whether death is appropriate; rather, it indicated that the Constitution mandated some type of procedure that would enable the sentencer to consider the character and record of the individual offender and the circumstances of the particular offense. Maryland has satisfied this constitutional obligation in its system of aggravating and mitigating circumstances.

Acceptance of Petitioners' argument, morever, would inevitably lead to reinstitution of a system allowing unbridled discretion. If life sentences may be imposed without regard to articulated aggravating and mitigating factors, there will soon be no principled and rational way to differentiate the few cases in which the death penalty is imposed from the many in which it

is not. All the Maryland statute requires is that the sentencer identify the mitigating factor - be it statutory or otherwise - that outweighs the statutory aggravating factors in the case. Without such articulation, the statutorily mandated proportionality review conducted by the Court of Appeals of Maryland would become immensely difficult. See Maryland Code, Article 27, §414(e)(4); Tichnell v. State, 297 Md. 432, 464-65, 468 A.2d 1 (1983). (C. 33-34). Under the opinions in Proffitt, Jurek, and Lockett, the Maryland procedure should be affirmed.

In addition to contending that the jury should be free to disregard the results of the weighing process and to impose a life sentence, Petitioners further contend that the Maryland statute is mandatory, and thus unconstitutional, because if an aggravating circumstance is proven, but no mitigating circumstance is proven, the jury again must impose the sentence of death. However, in the case of each petitioner, the jury did find at least one mitigating factor and thus the weighing process was employed. They were not subject to the defect now alleged.

In sum, the Maryland legislature has enacted a system of guided discretion assuring that a death penalty will be imposed only after consideration of the circumstances of the crime and the characteristics of the defendant. There is no restriction on what may be considered as a mitigating circumstance and no restriction on the relevant evidence that a defendant may produce. As a result, there is simply no constitutional infirmity and no need for further review by this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of April, 1984, a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed, postage prepaid, to George E. Burns, Jr., Assistant Public Defender, Tower Building, 222 E. Baltimore Street, Baltimore, Maryland 21202.

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